

## REAL ESTATE LITIGATION 2026

### PAPER 1.1

# Follow the Assets: Tracing in Real Estate Litigation

These materials were prepared by Dan Parlow of Kornfeld LLP, Vancouver, British Columbia for the Continuing Legal Education Society of British Columbia, April 10, 2026.

© Dan Parlow



# FOLLOW THE ASSETS: TRACING IN REAL ESTATE LITIGATION

## I. Introduction

Tracing (sometimes called “following”) may be used to describe one or more of an equitable remedy, a remedy at law, or an accounting process. As an equitable remedy, tracing is typically asserted as an adjunct to one or more other equitable remedies which form the “proprietary base” for the entitlement to trace.

At common law, tracing may be asserted where possession has passed but legal title remains with the claimant.

Courts have commented on occasion that, rather than being a remedy in and of itself, tracing is a mechanism or process used to establish the extent to which an equitable remedy may be available on the facts.

In this paper, I will first discuss circumstances giving rise to causes of action which may result in tracing. I will then discuss the principles by which the process is applied where there are competing interests in the property sought to be traced.

## II. The Concept

In *Garcha v. 690174 B.C. Ltd.*, 2023 BCCA 376, the Court described the process of tracing in the following terms:

[67] In *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 15 [*B.M.P.*], the Supreme Court of Canada described tracing as “... an identification process. The common law rule is that the claimant must demonstrate that the assets being sought in the hands of the recipient are either the very assets in which the claimant asserts a proprietary right or a substitute for them”: at para. 75.

[68] In *Waters’ Law of Trusts in Canada* (5th ed.), the authors illustrate how tracing works: The paradigm case of traceable proceeds is a clean substitution. With \$10,000 of trust money, the trustee in breach of trust buys an estate in land. The estate is the traceable proceeds of the trust property. There is a factual inquiry into what was actually done with the original property. The traceable proceeds, being the exchange products acquired with the trust property, become themselves trust property. There is no limit to the number of exchanges through which one might trace. In general, intention is not relevant. Whether the trustee wanted the estate in land to be held in trust or held personally is beside the point. Because it was acquired in exchange for trust property, it is itself trust property, if the beneficiaries so elect...

[69] Tracing is an “evidentiary process” and “possible if identification is possible”: *B.M.P.* at para. 79. The fundamental question to ask is whether that which is sought by the claimant is ascertainable as “the product of, or substitute for, the original thing”: *B.M.P.* at para. 86, citing *Banque Belge pour l’Étranger v. Hambrouck*, [1921] 1 K.B. 321 (C.A.) at 335. See also, *The Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9 at para. 99.

### III. Categories of Claims Involving Tracing

Tracing may be sought in conjunction with claims for a wide variety of remedies. These include constructive trusts; equitable liens and charges; express or implied trusts; and trusts imposed by statute such as the *Builders Lien Act*, S.B.C. 1997, c. 45, the *Family Law Act*, S.B.C. 2011, c. 25 or the *Wills and Estates Succession Act*, S.B.C. 2009, c. 13.

In some cases, tracing claims may arise in the absence of a claim for a proprietary remedy. For example, in claims under the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163, a creditor may seek to trace assets into the hands of others without asserting any form of proprietary claim to the transferred property *per se*. In such cases, the consequences are governed by the applicable statutory regime and jurisprudence thereon.

Claims involving tracing which are commonly asserted are discussed below.

#### A. Constructive Trusts

Tracing commonly arises in conjunction with a finding of constructive trust, which may be ordered where “good conscience” requires. A foundational element of constructive trusts, being the ability to point to a *link or causal connection* between the plaintiff’s contribution and the acquisition of specific property, was set out by Cromwell J. in *Kerr v. Baranow*, 2011 SCC 1 at para. 50:

. . . the constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property (*Pettkus*, at pp. 843-44 and 847-48). Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour (*Pettkus*, at pp. 852-53; *Sorochan*, at p. 50). (emphasis added)

There are two basic categories of constructive trust, substantive and remedial. The distinction between these categories - which can be critical to a tracing claim - was set out by Lambert J.A. in *Atlas Cabinets and Furniture Ltd. v. National Trust Co.* (1990) 45 B.C.L.R. (2d) 99 (C.A.), affirmed by Newbury J.A. in *BNSF Railway Company v Teck Metals Ltd.*, 2016 BCCA 350 at paras 20 and 60, in the following terms:

A substantive constructive trust must be distinguished from a remedial constructive trust. In a substantive constructive trust, the acts of the parties in relation to some property are such that those acts are later declared by a court to have given rise to a substantive constructive trust and to have done so at the time when the acts of the parties brought the trust into being. ... In a remedial constructive trust, on the other hand, the acts of the parties are such that a wrong is done by one of them to another so that, while no substantive trust relationship is then and there brought into being by those acts, nonetheless a remedy is required in relation to property and the court grants that remedy in the form of a declaration which, when the order is made, creates a constructive trust by one of the parties in favour of another party.

Two criteria must normally be satisfied for a constructive trust to be found: (1) a monetary award must be inadequate, insufficient, or inappropriate in the circumstances and (2) there is identifiable property to which the plaintiff contributed in some manner: *BNSF Railway*, at paras. 57-60. This is often referred to as the “referential property”.

In assessing tracing opportunities, it is helpful to consider the evolution of the constructive trust as a remedy. Initially, it was used primarily as “a proprietary device that could resolve, at least in some cases, the injustice inherent in the common law of matrimonial property”: *BNSF Railway*, at para. 26. Over time, scenarios giving rise to imposition of a constructive trust evolved to include cases of breaches of fiduciary duty and fraud. For example, in *Soulos v. Korkontzilas* [1997] 2 S.C.R. 217, a realtor’s taking, in his wife’s name, of a client’s *opportunity* to purchase property led to the imposition of a substantive constructive trust, i.e. one which had always existed. The plaintiff had to show (a) that the defendant had been under an equitable obligation in relation to the activities giving rise to assets in his or her hands; (b) that the assets had resulted from activities in breach of that obligation; (c) a legitimate reason for seeking a proprietary remedy, such as ensuring fiduciaries remain faithful to their duties; and (d) the absence of factors rendering a trust unjust, such as the rights of innocent third parties. The constructive trust would be imposed “not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which ‘in good conscience’ they should not be permitted to retain.”: per McLachlan J.A. (as she then was) at para. 17.

A series of decisions ensued in which the courts imposed remedial constructive trusts in a wide variety of scenarios, an analysis of which is beyond the scope of this paper. This resulted in some commentators questioning whether the law of substantive trusts had been effectively subsumed in the remedial trust decisions. This question was put to rest in *BNSF Railway, supra*, in which the Court of Appeal confirmed that “the ‘ancient and eclectic’ institution of the substantive constructive trust has not been ‘expunged’ in Canada by the development of its remedial counterpart”. In *BNSF Railway*, the plaintiff’s claim for moneys had and received, subsumed in the law of restitution, was held to ground an action for a *substantive* trust.

Where the referential property has been converted into other forms, it is helpful if counsel is able to pinpoint that the initial trust was substantive in nature. Since a substantive constructive trust confirms beneficial ownership “at the time when the acts of the parties brought the trust into being”, property into which it can be traced will be more readily subject to an extension of the trust than under a remedial trust scenario in which no “trust relationship [had been] then and there brought into being”: *BNSF Railway, at p. 108*.

## **B. Express or Implied Trusts**

Tracing can also be effectively employed to provide a remedy where property has been transferred in breach of an express or implied trust. Such a claim will follow the requirements set out above, namely, the plaintiff will have to identify the property into which the trust property has been converted and the remedy must not be precluded by *bona fide* third party rights. Subject to the foregoing, the claimant will be entitled to assert an *in rem* claim in the destination property as well as other property into which it may have been subsequently converted, whether directly or indirectly.

A traceable express trust was identified in *PricewaterhouseCoopers v Bank of Montreal*, 2017 NLTD(G) 43, a case involving a realty company in receivership. The court held at para. 12:

The three certainties of trust are made out with regard to the Traceable Funds:

- 1) There was an intention to create a trust: the Traceable Funds were paid to 50549 on the basis that they would be held for the benefit of the vendor or purchaser;
- 2) The subject matter of the trust is certain: the amount of the deposit in respect of a given transaction;
- 3) The vendors and purchasers that are the beneficiaries of the trust are certain: trust interests in the Traceable Funds are limited to the vendors and purchasers on each transaction.

[13] As a result, subject only to the contractual right of 50549 to withhold commissions from deposits credited to vendors, the Traceable Funds are subject to an express trust in favour of the vendors and purchasers, and must be disbursed to vendors and purchasers as required by each transaction.

This concept applies equally to real property which has changed its form. In *Garcha, supra*, the trust beneficiaries of land which had been the subject of a joint venture and express trust over a lot which was subsequently added to a land assembly, subdivided and then sold, were entitled to trace their beneficial interests into the proceeds of sale of the subdivided and developed lots in the land assembly on this basis: at paras. 64-72.

In *Mand v. Cheema*, 2025 BCSC 1595, a potential development property, held subject to an express trust, was reconfigured following a land swap with the City of Surrey. Blake J., citing *Garcha*, held that the “change has no substantive impact on the respective rights and responsibilities of [the trustee and litigating beneficiaries] as the law of tracing would follow the Property, notwithstanding the new PID”: at para. 397.

### C. Equitable Liens and Charges

The historical distinction between equitable liens and equitable charges has been much discussed but inconsistently applied, with nomenclature varying over time and across jurisdictions. Sometimes, the two concepts are combined into the term “charging lien”.

Equitable liens and charges arise largely in three situations: by course of conduct, by agreement, or by statute.

Equitable liens arising by course of conduct are sometimes called “true equitable liens” and are so declared to redress situations of unjust enrichment where it is “just and equitable” to impose them. Such a lien confers “a charge upon property until certain claims are satisfied”; it exists “independently of possession”; and it may be “enforceable by means of an order for sale”: *Snell’s Principles of Equity*, P.V. Baker and P. St. J. Langan, eds., 29th ed. (London: Sweet & Maxwell Ltd., 1990), p. 456.

By operation of law, an unpaid vendor of property is given a lien over the property for which he or she has not yet been paid. Such liens were considered in the development of the constructive trust and their utility may overlap with that remedy.

Similarly, an equitable charge is created “when property is expressly or constructively made liable, or specially appropriated, to the discharge of a debt or some other obligation, and confers on the chargee a right of realization by judicial process, that is to say, by the appointment of a receiver or an order for sale”: *Swiss Bank Corp. v. Lloyds Bank Ltd.*, [1982] A.C. 584 (HL).

The interest in property arising from an equitable charge was reviewed by Barbara Cotton in her article, “The Equitable Lien: New Life In an Old Remedy?”<sup>1</sup>, as follows:

An equitable mortgage is an interest in property and is different from an equitable lien in that it grants the mortgage the additional right to foreclose against the property. All equitable mortgages are equitable liens, but not all equitable liens are equitable mortgages. The distinction between the two is articulated by Buckley L.J. in *Swiss Bank*:

An equitable charge may, it is said, take the form either of an equitable mortgage or of an equitable charge not by way of mortgage. An equitable

---

<sup>1</sup> [http://www.bottomlineresearch.ca/pdf/equitable\\_lien.pdf](http://www.bottomlineresearch.ca/pdf/equitable_lien.pdf)

mortgage is created when the legal owner of the property constituting the security enters into some instrument or does some act which, though insufficient to confer a legal estate or title in the subject matter upon the mortgagee, nevertheless demonstrates a binding intention to create a security in favour of the mortgagee . . . An equitable charge which is not an equitable mortgage is said to be created when property is expressly or constructively made liable, or specially appropriated, to the discharge of a debt or some other obligation, and confers on the charge a right of realization by judicial process, that is to say, by the appointment of a receiver or an order for sale.”

In some cases, a plaintiff may be entitled to elect between an equitable lien and a constructive trust. A trust will likely be chosen where property has increased in value whether through accumulated profits, capital gains or a combination of the two. If, however, the property has decreased in value, the plaintiff may prefer to elect an equitable lien, preserving a residual claim which may be enforced against other assets.

The equitable lien is to be distinguished from a legal possessory lien over the client’s property which arises in specified circumstances. A solicitor’s lien may be used to secure fees and disbursements where property has been recovered or preserved as a result of a litigation proceeding in which the solicitor has been involved. As discussed in *Wilson King & Co v Lyall (Trustees of)*, 1987 BCJ No. 709, 12 BCLR (2d) 353 (CA) and affirmed by Newbury J.A., writing for the court on this issue, in *Cliffs Over Maple Bay (Re)*, 2011 BCCA 346, the purpose of a “charging lien” is to protect a lawyer from the unjust result of recovering or protecting property and not receiving full payment for services rendered.

As noted by the Law Society of British Columbia in “Solicitor’s Liens and Charging Orders” updated to July 2013, a charging lien may not fall under the traditional definition of a “lien”, as it may include property which is not in the solicitor’s possession. Rather, it reflects the solicitor’s right to request the equitable interference of the court and claim a charge against property that has been recovered or preserved through his or her efforts. In British Columbia, this right at common law has been codified in section 79 of the *Legal Profession Act*, SBC 1998, c. 9, which provides that a “lawyer who is retained to prosecute or defend a proceeding in a court or before a tribunal has a charge against any property that is recovered or preserved as a result of the proceeding for the proper fees, charges and disbursements of or in relation to the proceeding, including counsel fees”.

#### **D. Purchaser’s Liens**

The nature of a purchaser’s lien was described by Madam Justice Newbury in *Pan Canadian Mortgage Group III Inc. v. 0859811 B.C. Ltd*, 2014 BCCA 113:

[1] The purchaser's lien is a relatively obscure equitable remedy with roots dating back at least to the mid-19th century: see *Wythes v. Lee* (1855) 61 E.R. 954; *Rose v. Watson* [1864] 10 H.L.C. 672. The lien is available to a purchaser who has paid all or part of the purchase price to the vendor of real or other property pursuant to a valid contract. If the transaction "goes off" without fault on the part of the purchaser, the lien provides him or her with a security interest, or charge, against the property to the extent of the money paid, plus interest and costs. It exists even though specific performance may not be available (as in this case, which involves strata lots that were never created) and even though the purchaser may have (legally) rescinded the contract. The lien is said to have the same effect as if the vendor had executed a mortgage in the purchaser's favour in the amount covered by the lien; and comes into existence at the moment of payment by the purchaser...

[2] True to its equitable roots, the purchaser's lien is intended to do justice in situations in which the common law does not, or cannot, do so. Thus in *Whitbread & Co., Ltd. v. Watt* [1902] 1 Ch. 835, Vaughan Williams L.J. observed that the lien "is not the result of any express contract" but is a right that may be said to have been invented "for the purpose of doing justice" (at 838). In a similar vein, it is said that the lien "supplies a remedy where the law falls short of accomplishing full justice"...

A purchaser's lien may arise when deposit funds are advanced by way of deposit directly payable to the vendor in a real estate transaction. Such a lien applies only if the deposit funds are advanced directly to the vendor - rather than in the vast majority of cases in which it is paid to a stakeholder pursuant to the provisions of the *Real Estate Act* - under a valid contract for purchase and sale of real estate: *1332404 B.C. Ltd. v. 1266685 B.C. Ltd.*, 2025 BCCA 46.

The purchaser's lien, and corresponding equitable interest in land, arise "from the moment the land is validly contracted to be sold". It continues in effect even where specific performance is not possible, or where the contract has been lawfully rescinded. It is lost where the contract goes off through the fault of the purchaser, but not otherwise: *1332404*, at paras. 7 and 10.

Purchaser's liens are occasionally asserted in circumstances giving rise to tracing. In the real estate development world, it is not uncommon for a vendor intending to redevelop lands to receive a significant deposit directly from a potential purchaser for the very purpose of assisting with a myriad of intended development expenses, including the acquisition of neighbouring parcels. By their nature, the deposit funds will likely find their way into any number of new parcels or strata lots. If a purchaser's lien can be established, it can be followed by principles of tracing into such properties and protected by the filing of a certificate of pending litigation against them.

The ability to recover under a purchaser's lien is of course subject to the substantive merits of the claim for return for the deposit. If it is established that the underlying contract is invalid, no

lien arises. Similarly, if the contract has "gone off through the fault of the purchaser", the lien is lost: 1332404, at paras 7, 10.

In *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2021 BCSC 2144, the purchaser (in reasons indexed at 2019 BCSC 739, appeal dismissed 2020 BCCA 130) had been refused specific performance of a contract to acquire valuable property intended for the purpose of building multiple residential towers. After the purchaser's claim was denied on the ground of its illegal purposes in the structuring and financing of the transaction, the court further denied its claim for return of a \$500,000 deposit paid directly to the vendor under the contract. For reasons expressed at 2021 BCSC 2144 at paras. 109-128, the purchaser was unable to establish a restitutionary remedy entitling it to return of its deposit.

Under such circumstances, no lien can arise whether by way of purchaser's lien, equitable lien or constructive trust, by which a deposit-payer might otherwise be entitled to trace the payment into other assets.

## **E. Fraudulent Conveyances**

Tracing is regularly used to attach assets which have reached others through fraud. As seen above, the claimant may have a proprietary claim to the source or "referable" property by virtue of an express, implied or constructive trust, or an equitable lien or charge, for which the process of tracing assumes the role discussed *supra*.

Where there is no proprietary claim, tracing may nevertheless give rise to a remedy by virtue of governing legislation such as the *Fraudulent Conveyance Act*, *supra*, which renders a disposition of property void and of no effect against a person whose rights and obligations are or might thereby be "disturbed, hindered, delayed or defrauded", unless the disposition was made "for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud".

To similar effect, under the *Fraudulent Preference Act*, RSBC 1996, c. 164, a disposition of property by a person at a time when that person is in insolvent circumstances, is unable to pay his or her debts in full, or knows that he or she is on the eve of insolvency, is void as against an injured creditor if the disposition was made with the intent to defeat, hinder, delay or prejudice creditors or to give one or more creditors a preference over others. Dispositions made with the effect, but not the intent, of giving preference to any creditor may nevertheless be void if the proceeding to set them aside is brought within 60 days.

In regard to fraudulent conveyances and preferences and their counterparts under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the distinction between tracing as an accounting process and tracing as an ancillary remedy is critical to the consequences for the parties and others. Where the tracing claim is ancillary to a proprietary claim, the claimant may

(subject to the rights of third parties) be entitled to a declaration that the traced property belongs to the claimant and an order that it be transferred accordingly (or that it be sold and the net proceeds transferred to the claimant).

On the other hand, when used as an accounting process under these or other statutory provisions, the consequences are generally that the transfer is unwound, the transferee and transferor are restored to their original positions, and the transferred property is sold and the proceeds (normally net of costs borne by the claimant) are distributed amongst all creditors legally entitled. Claimants without a proprietary interest may be subordinated to those with a proprietary interest.

#### IV. The Ability to Trace

Once the base ground for tracing has been identified, further questions will arise as to the mechanics of tracing as well as potential competing claims.

The ability to trace in fashioning an effective remedy presupposes that specific funds or property can be located and readily identified, whether in a segregated fund, in a mixed fund, or in other property acquired therewith. Equally fundamental is the requirement that the property has not been transferred to a bona fide purchaser for value without notice.

The following principles, enunciated in *McTaggart v. Boffo* (1975) 64 D.L.R. (3d) 441 (Ont. H.C.J.) at 458 in the context of monies, are also applicable to real property:

Tracing is only possible so long as the funds can be followed in a true sense, i.e., so long as, whether mixed or unmixed, it can be located and identified. It presupposes the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by the means of such a fund. Simply put, two things will absolutely prevent the tracing of trust monies:

- a. If, on the fact of any individual case, such continued existence of the identifiable trust fund is not established, equity is helpless to trace it;
- b. the chain for tracing is also broken where the trust fund either in its initial form or a converted form has found its way into the hands of a third person purchaser for value without notice.

The aptly-named *Tracy v. Instalogs Financial Solutions Centres (B.C.) Ltd.* 2010 BCCA 357, is a leading authority in which our Court of Appeal cited with approval the foregoing principles from *McTaggart*. In *Tracy*, the court traced funds impressed with a constructive trust, by virtue of their having been unlawfully collected by payday loan companies from their customers, into the hands of certain affiliated corporations. Newbury J.A. succinctly summarized the nature of the exercise:

[41] I conclude, then, that the trial judge considered the correct legal “tests” in approving a constructive trust as a restitutionary remedy for the defendants’ unjust enrichment. As mentioned above, however, it is only if the Unlawful Finance Charges or their proceeds are identifiable in the hands of defendants farther up the transactional chain than the Storefront Lenders that a constructive trust may be asserted against those defendants. The process by which the plaintiffs may ‘follow’ the Charges up the chain is tracing – the “process by which the plaintiff traces what has happened to his property, identifies the persons who have handled or received it, and justifies his claim that the money which they handled or received ... can properly be regarded as representing his property”. (Per Millett L.J. (as he then was) in *Boscawen v. Bajwa* [1995] 4 All E.R. 769 (C.A.) at 776.) Although tracing is available both at law and in Equity (see Maddaugh and McCamus, supra, at chapters 6 and 7), the right which the plaintiffs are entitled to trace in this case is the constructive trust, an equitable property right. I agree with Professor Lionel Smith (The Law of Tracing (1997)) that the establishment of this proprietary right, which he refers to as the “proprietary base”, is sufficient to establish an entitlement to trace. It is not necessary, as was once argued, to demonstrate a pre-existing fiduciary relationship: see *Citadel General Assurance Co. v. Lloyds Bank Canada* [1997] 3 S.C.R. 805 at para. 57. (emphasis added)

In *Jacobs v Yehia*, 2015 BCSC 267, reversed on other grounds 2016 BCCA 38, the Court found at an interlocutory stage that there was an arguable case for the imposition of a remedial constructive trust in certain property into which misappropriated funds might be traced. Such property could be impressed with a trust either directly through unjust enrichment or indirectly by tracing property acquired with ill-gotten funds. As a result, the certificate of pending litigation was sustainable.

In *Edmonton Region Community Board for Persons with Development Disabilities v Pearl Villa Homes Ltd.*, 2010 ABQB 786, the plaintiff alleged that from 2000 to 2003, the defendant had over-billed and had been remunerated by the plaintiff for over \$3 million in services it did not actually provide. There was evidence that the funds so obtained were transferred to certain persons who used them to pay down mortgages. The Court found that it was therefore not plain and obvious that the Plaintiff could not succeed in its claim for a constructive trust over the ultimate properties. The court noted that the approach taken by the British Columbia Court of Appeal in *Tracy* suggests such a trust would be subject to the limitations of the tracing process, discussed below.

*Govorcin Fisheries Ltd. v. Medanic Fisheries Ltd.*, 2022 BCSC 1201 provides an excellent example of tracing being applied to a multiplicity of assets acquired both directly and indirectly. In *Govorcin*, the plaintiff established that misappropriated profits from a fishing joint venture had been applied by the defendants to purchase fishing licenses and an array of real estate assets over a 20-year period. A variety of liens and charges had been filed and asserted over a multiplicity of such assets. These included assets alleged to have been subsequently purchased

through the use of both profits and sale proceeds generated by the former assets. Masuhara J. made a series of preliminary determinations on the merits of the base claims and, at paras. 264-267, ordered further discovery processes leading to a secondary “remedies” trial in which the plaintiff would make elections based on the most advantageous options. The matter was subsequently resolved.

## V. Application to Fraudulent Conveyance Claims

The courts have also recognized the ability to trace in relation to transfers made contrary to the *Fraudulent Conveyance Act* or the *Fraudulent Preference Act*. For instance, in *Barregar v. Turi*, 1997 CanLII 934 (BCSC), the court traced the proceeds of a fraudulent conveyance into a property subsequently purchased by the defendant’s son and parents. The court concluded, at para. 40, that “when property in the hands of a fraudulent purchaser is converted into money, the fund, once created, is impressed with the same trust as the property in its original form” and declared that the defendant’s family members held in trust for the defendant an undivided one-half interest in the subsequent property. As noted above, it was not necessary for the creditor asserting the claim that he himself had a proprietary interest in the transferred property.

Nor is it necessary for the claimant who pursues the tracing exercise to have been a creditor at the time that the conveyance took place. In *Guthrie v. Abakhan & Associates Inc.*, 2017 BCCA 102, the appellant’s ex-husband had fraudulently conveyed his property to his second wife. The appellant later sought support arrears against the ex-husband and obtained a declaration from the court that the conveyance was fraudulent and an order awarding costs, which she registered against the transferred property.

The property thereafter went into foreclosure and the proceeds of the sale were paid to a trustee in bankruptcy, who disputed the appellant’s claim. The trial judge held that by virtue of the *Fraudulent Conveyance Act*, the impugned transfer was “void and of no force and effect insofar as it affects the rights of the Claimant ... as judgment creditor of the Respondent”, thereby entitling the Claimant “to pursue her just and lawful remedies as a judgment creditor against the Respondent ... as if he were still the legal and beneficial owner of the Alderwood Property to the same extent as he was before the transfer of the Alderwood Property, including that the Claimant ... is entitled to register judgments against James Alexander Michie on Dawn Lanelle Michie’s title to the Alderwood Property”: *Guthrie*, BCCA at para. 4, citing *Waters v. Michie*, 2012 BCSC 639 at para. 169.

This interpretation of the statute was altered on appeal. Newbury J.A., for the court, applied a purposive approach to the *Act*:

[26] I agree with the appellant’s submission, then, that the chambers judge erred in holding that the orders made by Humphries J. validly restricted Ms. Guthrie’s remedies

under the *Fraudulent Conveyance Act* to the enforcement of Mr. Michie’s child support arrears. No authority was cited to us, and I have found none, that suggests it is open to a court to declare a fraudulent transfer “void” under the Act *only to a certain extent or only to permit a certain debt* to be recovered; to declare a transfer void *only as against a particular creditor* but not as against other creditors delayed or hindered by the transfer; or to declare a transfer void *only for a limited time*. Once a conveyance has been found to infringe the Act, it remains fraudulent, and is ineffective as against all creditors who may be hindered or delayed. As counsel for the appellant suggested, it would be “contrary to logic” as well as to authority (and in this case would be placing form over substance) to require that a creditor who wishes to enforce more than one judgment return to court to have the same transaction declared void “time and time again”. Similarly, it would offend the purpose of the Act to require that creditor after creditor prove in court that the same transfer was intended to avoid the just claims of creditors. [bolding in original; underlining added]

[27] On this point, I note in particular *Canadian Imperial Bank of Commerce v. Boukalis* (1987) 1987 CanLII 2694 (BC CA), 11 B.C.L.R. (2d) 190, *Ive. ref’d*. [1987] S.C.C.A. No. 180, in which this court (sitting with five justices) ruled that a person who was a secured creditor at the time of a fraudulent conveyance had standing to sue under the *Fraudulent Conveyance Act*, as could a person who became a creditor after the conveyance took place. The Court cited with approval the following passage from *Reid v. Kennedy* (1874) 21 Gr. 86:

The words in the Act are “creditors and others,” and proving that the conveyance was tainted with fraud once, I do not think it loses this stain, but remains a conveyance with this infirmity which prevents it being set up as against a creditor whose debt arises years after the instrument was executed. The words “and others” extend the operation of the Act if the word creditors confined it to those existing when the deed was made. [Quoted at 195 of *Boukalis*; emphasis added.]

and *Petrone v. Jones* (1995) 1995 CanLII 7374 (ON SC), 33 C.B.R. (3d) 17 (Ont. Gen. Div.), where the Court rejected the suggestion that “a transaction entered into with the specific intent of defeating, hindering, delaying...one creditor may be valid as against another creditor.” (At 19).

Unlike in classic tracing claims, therefore, tracing is available under fraudulent conveyance legislation without the need for a proprietary claim or a reference property related to a specific claimant. This highlights intrinsic nature of tracing as a *process* related to other remedies, rather than being a remedy in and of itself.

## VI. Assessment of Competing Claims to a Fund or Property

As early as 1880, Jessel MR, in *Re Hallett's Estate* (1880) 13 Ch. D. 696, observed (at 710) that “modern [tracing] rules ... have been ... altered, improved, and refined from time to time”. In *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, McLachlin J.A. (as she then was) noted that equity's “flexible remedies such as constructive trusts, account, tracing and compensation must continue to be moulded to meet the requirements of fairness and justice in specific situations”.

An excellent summary of the courts’ evolving approaches to competing claims to a common fund was set out by Yamauchi J. in *Easy Loan Corp v Base Mortgage & Investments Ltd*, 2016 ABQB 77, which is set out verbatim below.

While the facts in *Easy Loan* involved competing claims to a bank account, its principles may be equally applicable in respect of competing claims to one or more properties funded by multiple contributors, either directly or indirectly, from an original fund or funds.

Yamauchi J. considered that, by ordering the distribution of funds to competing claimants, the court was essentially undertaking “loss allocation among the various investors” (at para 54). He then continued:

55 Canadian courts have determined that there are 3 ways in which this Court could order the distribution of the monies in the Bank Account among the Applicants and other investors, which are as follows:

- (1) "First in, first out": this is derived from the *Clayton's Case*, Re (1816), 1 Mer. 572 (Eng. Ch. Div.) [*Clayton's Case*], where the court held that the first money deposited into the account is presumed to be the first money withdrawn;
- (2) *Pro rata* or *pro rata ex post facto* sharing based on the original contribution that the various claimants made, regardless of the time they made their contributions. If there is a shortfall, between the amount the claimant's claim and the amount remaining in the account, the claimants share proportionately, based on the amount of their original contribution;
- (3) *Pro rata* sharing based on tracing or the lowest intermediate balance rule ("LIBR") which says that a claimant cannot claim an amount in excess of the lowest balance in a fund subsequent to their investment but before the next claimant makes its investment.

56 Although the rule in *Clayton's Case* has been used by Canadian courts, practically it has fallen is [sic] disuse because it is "arbitrary and unfair": *Ontario (Securities Commission) v.*

*Greymac Credit Corp.* (1986), 55 O.R. (2d) 673, 30 D.L.R. (4th) 1 (Ont. C.A.) [*Greymac*, cited to DLR], aff'd [1988] 2 S.C.R. 172 (S.C.C.).

57 In *Greymac*, the Ontario Court of Appeal provided the following quotation from *Walter J. Schmidt & Co., Re*, 298 Fed. 314 (U.S. Dist. Ct. S.D. N.Y. 1923), at 316 in support of its holding:

The rule in Clayton's Case is to allocate the payments upon an account. Some rule had to be adopted, and though any presumption of intent was a fiction, priority in time was the most natural basis of allocation. It has no relevancy whatever to a case like this. Here two people are jointly interested in a fund held for them by a common trustee. There is no reason in law or justice why his depredations upon the fund should not be borne equally between them. To throw all the loss upon one, through the mere chance of his being earlier in time, is irrational and arbitrary, and is equally a fiction as the rule in Clayton's Case, *supra*. When the law adopts a fiction, it is, or at least it should be, for some purpose of justice.

*Greymac* at 15.

58 Of course, the reason why the rule in Clayton's Case is considered arbitrary and unfair is because it is prejudicial to those who contributed earliest to the fund. The reason it is a fiction is that no one knows with any certainty that the withdrawals from the fund were taken from the money first deposited. There is no allocation of loss. It places the loss squarely at the feet of those who deposited their funds earliest.

59 None of the parties in the case at bar has asked this Court to apply the rule in Clayton's Case to the loss allocation it is considering. This Court agrees and will not discuss that case any further.

60 The LIBR approach assumes that the investor can identify the monies it has deposited into the fund. The sum of the amount existing in the fund at the time of the investor's deposit and the investor's deposit make up the total of the fund at that time. A simple calculation will determine the percentage of each to the total amount that makes up the fund. Sulatycky ACJ in *Elliott, Re*, 2002 ABQB 1122, 11 Alta. L.R. (4th) 358, 333 A.R. 39 (Alta. Q.B.) [*Elliott*] then outlines the way in which LIBR will work as follows:

... [W]here the funds in an account are depleted below the trust money balance, further deposits by the trustee cannot be accessed by the beneficiaries. They are, instead, limited to the lowest intermediate balance of the account. This is rational, because the entire line of cases being discussed is based on equitable rules of tracing. It is impossible to affix money subsequently deposited with the imprint of tracing. Only the money still remaining can be traced.

61 In *Boughner v. Greyhawk Equity Partners Limited Partnership (Millenium)*, 2012 ONSC 3185, 111 O.R. (3d) 700, 95 C.B.R. (5th) 239(Ont. S.C.J. [Commercial List]), aff'd 2013 ONCA 26, 5 C.B.R. (6th) 113 (Ont. C.A.) [*Boughner*, cited to ONSC], Morawetz J provides the following example of how LIBR works:

... A invests \$100 in a fund. The value of the fund then declines to \$50. B invests \$100, bringing the balance in the fund to \$150. The value of the fund then declines to \$120.

In this fact pattern, if LIBR were applied, A could not claim more than \$50, because that is the lowest balance in the fund prior to B's investment. In other words, the initial decline in the value of the fund from \$100 to \$50 is borne entirely by A. When B contributes \$100, her investment constitutes 2/3 of the \$150 in the fund. As a result, when the fund declines to \$120, 2/3 of the decline is borne by B, while 1/3 is borne by A. Therefore, of the \$120 remaining in the fund, A can claim \$40 while B can claim \$80.

*Boughner* at paras 4-5.

62 In the end, the LIBR approach does not permit an investor to receive more than what can be traced from their contribution. Timing is important.

63 Timing is not so important in the pro rata ex post facto approach, which Sulatycky ACJ described in *Elliott* as follows:

In the *pari passu ex post facto* approach applied in *Law Society of Upper Canada v. Toronto Dominion Bank*, the total quantum of available assets is determined — i.e., the amount remaining in the trust accounts. The funds are then shared proportionally among the contributors to the fund (except for any money contributed by the trustee, as that is considered applied to the shortfall). The date of deposits is ignored.

64 Thus, in the example that Morawetz J provides in *Boughner*, A and B would receive \$60, as each invested an equal amount of \$100.

65 Thus, there are 2 approaches that this Court can consider when determining how best to distribute the monies in the Bank Account. Both have their advantages and disadvantages, which this Court will discuss in a moment. The overarching aspect, however, is that this Court must apply an approach that is logical, just, equitable and convenient: *Greymac* at 7; *Law Society of Upper Canada v. Toronto Dominion Bank* (1998), 169 D.L.R. (4th) 353, 42 O.R. (3d) 257, 44 B.L.R. (2d) 72 (Ont. C.A.) [*TD Bank*, cited to DLR] at para 31.

66 The LIBR approach has been criticized as being the reverse of the rule in *Clayton's Case* in the sense that it is a "last in, first out" approach: *TD Bank* at para 9. As well, the LIBR approach is more difficult and more complicated than the *pari passu ex post facto*

approach and, accordingly, the court should try to find a solution that is workable: *TD Bank* at paras 33-34; *Greymac* at 17. Furthermore, the LIBR approach is difficult to apply "where there are numerous deposits and withdrawals, as the LIBR has to be determined at multiple points throughout the account's history: *Elliott* at para 37.

67 The *pari passu ex post facto* approach, on the other hand, "seems unfair to late investors": *Boughner* at para 42, quoting *Barlow Clowes International Ltd. v. Vaughan* (1991), [1992] 4 All E.R. 22 (Eng. C.A.). As stated in *Waters* at 1283, "Although there is a certain fairness in proportionate sharing, this approach shifts earlier losses onto later contributions, whose money could not possibly have been implicated in those losses." Furthermore, in the case at bar, certain of the Applicants have acknowledged that they received payments of some form or another from Base Finance. As Morawetz J said in *Boughner*, "Just as earlier investors would not have expected to share their gains with later investors, they should not be allowed to so share their losses": *Boughner* at para 56.

68 The *pari passu ex post facto* is more simple to apply. One simply takes the total amount remaining in the Bank Account and divides it proportionately among the investors in accordance with the deposits they made into the Bank Account. There is a certain complexity, however, in this approach. The Bank Account had an opening balance. How does one distribute the opening balance among the investors? Did those earlier investors, or some of them, invest in a legitimate scheme, or were they similarly "duped" by Mr. Breitkreuz? Which ones were duped? Must the amounts that Applicants and others received from the Bank Account be accounted for in calculating their losses?

69 In the case at bar, the parties have advised this Court that they have access to the complete records of the Bank Account from the date that Base Finance opened the account sometime in May of 2014, which shows not only the debits and credits, but also the balances in the account for all those transactions. As well, this Court assumes that RBC can provide the parties with the cancelled cheques that show the deposits. This differs from *Elliott*, where the parties provided Sulatycky ACJ merely with "evidence as to final balances and the dates and amounts of the claimants' deposits": *Elliott* at para 31. How could Sulatycky ACJ possibly come to a rational conclusion that LIBR could be applied, given the paucity of the information the parties provided to him? His only choice was to apply the *pari passu ex post facto* approach.

70 This Court recognizes that the Ontario Court of Appeal (as affirmed by the Supreme Court of Canada) applied the *pari passu ex post facto* approach in *Greymac*. That application, however, does not derogate from Morden JA's comment that although the *pari passu ex post facto* approach might be appropriate in some circumstances, he did not feel it would be appropriate "where the contributions to the mixed fund can be simply traced": *Greymac* at 16. Morden JA went on to say the following:

I am not persuaded that considerations of possible inconvenience or unworkability should stand in the way of the acceptance, as a general rule, of [LIBR]. That it is sufficiently workable to be the general rule is

indicated by the fact that it appears to be the majority rule in the United States.

*Greymac* at 17.

See also *TD Bank* at para 32.

71 This Court recognizes that calculating entitlement to the Bank Account might be considered by some to be inconvenient and moderately complex. It is not, however, impossible to do the calculations. Inconvenience should not stand in the way of fairness.

Dismissing the appeal, *sub nom Easy Loan Corporation v Wiseman*, 2017 ABCA 58, the Alberta Court of Appeal confirmed that LIBR “is the fairest rule absent two exceptions (unworkability or the contrary intention of the beneficiaries) which we have concluded do not apply.”

The “contrary intention” exception was discussed in *Greymac, supra*, and approved by the Alberta Court of Appeal in *Easy Loan* at para 59:

*Greymac* states at para 53: “Another exception, an obvious and necessary one ... would be the case where the court finds that the claimants have, either expressly or by implication, agreed among themselves to a distribution based otherwise than on a *pro rata* division following equitable tracing of contributions.” Blair J. also noted that it “is always open to a trust contributor to gain protection from having to share a shortfall with others by insisting upon the funds being placed in a separate trust account.”: *LSUC* at para 27. Finally, in *Demystifying the Lowest Intermediate Balance Rule, supra*, Chamorro-Courtland wrote at 66-67 (emphasis in original):

In summary, consideration must first be given to the express or implied contractual intention of the beneficiaries in the case of a shortfall in a commingled trust fund; the beneficiaries may opt for any distribution method that satisfies their business needs.

If the contract is silent as to the method of distribution, the presumed intention, as the general rule, should be that the beneficiaries intended to segregate their funds and use LIBR. This is the presumption even in cases where the parties have opted to commingle their funds in an omnibus account, as it is possible to legally segregate the funds...

In *Re Graphicshoppe Ltd* (2005), 260 D.L.R. (4th) 713, 78 O.R. (3d) 401 (C.A.), the impugned account included deposits other than those made by innocent beneficiaries. After the beneficiaries made all their contributions, the lowest balance of the account was, at one point, negative. Accordingly, the beneficiaries were precluded from the ability to trace their funds. The Ontario Court of Appeal noted at para 130:

While this may seem harsh, it must be remembered that in the commercial context and particularly in the realm of bankruptcy, innocent beneficiaries may well be competing

with innocent unsecured creditors for the same dollars. This raises policy considerations which the courts in *Greymac* and *LSUC* did not have to face.

The British Columbia Court of Appeal in *Tracy, supra*, considered unjust enrichment claims arising from thousands of loan transactions, the proceeds of which had travelled through various 'mixed' accounts such that they could no longer be reliably identified.

The court proceeded, at para. 37 *et seq*, to address "the fairness of providing the claimant in an unjust enrichment case with a proprietary interest that will prevail over the interests of ordinary creditors", noting as follows:

The imposition of a trust may also be seen to work an injustice as between creditors in some instances. Thus Professor Paciocco in "The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors," 68 *Can. B. Rev.* 315 noted in 1989:

Goff and Jones have warned ... that [the rules regarding tracing into mixed funds] emerged in context of the equitable tracing remedy in order to prefer the beneficiaries to the bankrupt trustees' general creditors. Moreover, they emerged in the context of what were "pure proprietary claims". It has to be wondered whether they are truly appropriate in the context of remedial constructive trusts in the commercial context where concern for creditors may constitute a reason why such rules should not be employed. Dobbs has suggested that to allow the imposition of a remedial constructive trust in the absence of true identifiability is to work a preference for no good reason. Why should the law presume that the funds of the general creditors are dissipated before the funds of the constructive trust beneficiary? [At 337.]

The author does conclude, however, that the "non-risk taking plaintiff" in an unjust enrichment action would normally have a higher claim to the property than general creditors, who have accepted the risk of being "simple debtors" of the defendant. (See also Leonard I. Rotman, "Deconstructing the Constructive Trust", (1999) 3 *Alta. L. Rev.* 133, at 165-170.)

[38] In the present case, the analysis is perhaps less difficult, assuming that the granting of a constructive trust falls under the "broad umbrella of good conscience" (*Soulos*, para. 48). Here the plaintiffs assert a trust in order to pursue the very funds (and any funds or other assets into which they have been transformed) they paid to the defendants and the defendants received in contravention of the Criminal Code. Their claims are therefore qualitatively different from those of general creditors or other persons dealing with the defendants in the normal course. The unjust enrichment here is not only a private wrong, but arises from a criminal offence in respect of which it is in the public interest that neither the wrongdoers nor their ordinary creditors be permitted to retain the benefit.

## VII. Extending Claim to Assets not Directly Traceable

Once the entitlement to a proprietary remedy has been established, a question may arise whether the charge can ever be extended over assets that are not traceable. The answer is generally no, yet exceptions apply.

The possibility to extend a proprietary remedy to assets not traceable under classic tests was considered by the Privy Council, on appeal from the Court of Appeal of The Bahamas, in *Space Investments Ltd. v. CIBC Co. (Bahamas) Ltd.* [1986] 1 W.L.R. 1072 (P.C.) at 1074. The Court contemplated that where a bank trustee wrongly used trust funds for the general purposes of the bank, equity allowed the beneficiaries to trace the trust moneys to all assets of the bank and to recover the trust money by exercising an equitable charge over these assets in priority to the claims of both other customers with deposits and unsecured creditors. The rationale was based on the *dicta* of Sir George Jessel M.R. In *Re Hallett's Estate* (1880) 13 Ch. D. 696 at 719, that “[i]f a man mixes trust funds with his own, the whole will be treated as the trust property,.... that is, that the trust property comes first”.

Ultimately, in *Space Investments* no equitable charge was available given a contractual provision which had authorized the deposit of the trust funds into the insolvent trustee’s general accounts: there was “nothing to trace”.

The concept considered in *Space Investments* was reconsidered, and rejected, by the English Court of Appeal in *Bishopsgate Investment Management Ltd (in Liquidation) v Homan*, [1994] 3 WLR 1270, in which the plaintiff was the trustee of certain assets of pension schemes out of whose funds money had been improperly paid into a bank account of another company, MCC. This bank account became overdrawn then was replenished. The plaintiff sought an equitable charge on all the assets of MCC. These claims were founded primarily on the foregoing observations in *Space Investments*. The Court of Appeal found that the *Space Investments* comments regarding tracing to all assets were strictly *obiter*, and not concerned with a situation where trust moneys had been paid into an overdrawn bank account. Equitable tracing cannot be pursued through an overdrawn and therefore non-existent fund nor can misappropriated money be traced into an asset bought before the money was received by the purchaser. In this case, the alleged “replenishment” of the overdrawn trust fund had not occurred since there was no evidence of any intention that the new funds would be clothed with a trust in favour of the plaintiff. Overall the Court rejected in principle the concept that an equitable charge can be placed on assets which cannot be traced.

To similar effect, in *Barnabe v Touhey*, 1995 CanLII 1672, the Ontario Court of Appeal refused to apply the remedy of constructive trust over the general assets of departing partners of a law firm on the basis that there was no specific property which would be the subject of the trust.

The requirement in constructive trusts of “identifiable property to which the plaintiff contributed in some manner” imports the concept of tracing. In this regard, Newbury J.A. in *BNSF, supra*, applied the Federal Court of Appeal’s reasoning in *Michelin Tires (Canada) Ltd. v. Canada* 2001 FCA 145 to establish the need to trace. In *Michelin Tires*, overpayments made by the plaintiff in respect of federal sales tax were held not to give rise to a constructive trust because the claimant was unable to identify “property in the hands of the defendant that is identifiable as the property, or its proceeds, that was transferred by or obtained from the plaintiff without a juristic reason, or that the defendant could not otherwise retain in good conscience.” Evans J.A., for the Court, emphasized at para. 19 that a constructive trust “attaches to specific assets of the defendant that represent the enrichment; it is not a charge on the defendant’s general assets for the amount of the plaintiff’s claim.” (emphasis added)

In family situations, the rules for tracing may be relaxed. In *Peter v Beblow* [1993] 1 SCR 980, Cory J. for the court, cited with approval Goff and Jones, *The Law of Restitution* (3rd ed. 1986), and extended the imposition of constructive trusts to situations where a plaintiff's contributions cannot be traced to a particular property. The court stated at 1020-1:

It seems to me that in a family relationship the work, services and contributions provided by one of the parties need not be clearly and directly linked to a specific property. As long as there was no compensation paid for the work and services provided by one party to the family relationship then it can be inferred that their provision permitted the other party to acquire lands or to improve them. In this case the work of the appellant permitted the respondent to pay off the mortgage and, as well, to purchase a houseboat and a cabin cruiser. In the circumstances, the trial judge was justified in applying the constructive trust to the property which he felt would best redress the unjust enrichment and would treat both parties in a just and equitable manner. (emphasis added)

Another exception to the requirement to trace specific proprietary claims arises where funds are deposited into a trust account with the intention of replacing misappropriated trust funds. In such a case, the new funds are impressed with the same trust character that would have applied to the misappropriated funds: *Ontario (Director, Real Estate & Business Brokers Act) v. NRS Mississauga Inc.* (2003), 64 O.R. (3d) 97, 226 D.L.R. (4th) 361 (Ont. C.A.) at paragraph 49.

An example of this arose in *PricewaterhouseCoopers v Bank of Montreal, supra*, involving a realty company in receivership. The “Lump Sum”, as therein defined, had been deposited into a trust account which had been totally depleted, with an intention to replace trust funds that had previously been removed. Since it was a replacement, it was not traceable to specific transactions. Based on the principle in *NRS Mississauga*, the Court concluded that the vendors and purchasers with proven but untraceable claims were entitled to benefit from a constructive trust over the Lump Sum and to have the Lump Sum divided among them *pro rata*. Effectively, the *pari passu ex post facto* approach was applied to assets which were deemed to be trust funds.

### VIII. The Adequacy of Pleadings

Tracing claims should be pleaded carefully, as a plaintiff's claim will often fail where the core requirements necessary to establish the underlying causes of action have not been set out. At times, inadequate pleadings arise due to lack of knowledge of what has happened to the trust property, i.e. into what form it may have been converted. A beneficiary without access to banking records – whether of the original trust property or of accounts into which the original property has been paid – may be in no position to meet the test of specificity in its pleading. Similarly, if moneys have passed from a trust account through one or more further accounts or properties before finding their way into land as the ultimate destination, no amount of sleuthing and no number of land title searches may reveal the chain.

In *BNSF*, Newbury J.A. for the court declined to accept that a plaintiff must necessarily “in its pleadings, and without the advantage of evidence or findings of fact, demonstrate that a monetary award would be inadequate or inappropriate and point to “identifiable property” to which it contributed, before it may seek a declaration of constructive trust founded on a valid cause of action”. The court held that there are circumstances in which a plaintiff may satisfy the two criteria for the finding of a constructive trust – i.e., demonstrate that a monetary award would be inadequate and identify property to which the plaintiff contributed in some manner – in the course of discoveries or trial, or be able to trace its funds into a mixed account or elsewhere, once the defendant's liability has been established.” (emphasis added).

*Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, a case involving alleged contraventions of the *Competition Act*, R.S.C. 1985, c. C-34, demonstrates the importance of pleading the essential elements even where details are unknown. In *Pro-Sys*, the Supreme Court of Canada, while allowing the action to proceed on other grounds, struck a constructive trust claim due to inadequate pleadings. Applying *Kerr, supra*, the court held that in order to find that a constructive trust is made out, the plaintiff must be able to point to a link or causal connection between his or her contribution and the acquisition of specific property. As the claim neither explained why a monetary award was inappropriate or insufficient nor showed a link to specific “referential” property, it did not satisfy the conditions necessary to ground a constructive trust. The claim was struck on the pleadings as it was plain and obvious that it could not succeed.

On the other hand, in *BNSF, supra*, the court found in para. 4 that “it may be incorrect to rule, before any facts have been found, that a constructive trust is “bound to fail” on the basis that the two criteria have not been satisfied in the plaintiff's pleading.” In its pleading, the plaintiff claimed that the two defendants “had and received” some \$14m and \$3.8m, respectively, allegations subsumed under the rubric of restitution; that the defendants held those payments in trust for it; that the defendants were each enriched thereby; and that there was no juristic reason for the payments or their retention.

The defendants argued that the plaintiff's claim was bound to fail since there was no factual basis of either the inadequacy of damages or the existence of a "'link' between the contribution that [founded] that action and the property in which the constructive trust [was] claimed". Newbury J.A. disagreed and held that the necessary elements of a substantive trust had in fact been pled with respect to the claim for moneys had and received.

In *Save-A-Lot Holdings Corp. v Christensen*, 2022 BCCA 39 at para 16, Newbury J.A. for the court, in *obiter*, clarified the precedential impact of *Pro-Sys* as follows:

[16] In his submissions on behalf of the defendants, Mr. Magnus referred to *Pro-Sys Consultants Ltd. v. Microsoft Corp.* [2013 SCC 57](#), which he contended determines the point. With respect, I do not read *Pro-Sys* as doing so. *Pro-Sys* was concerned with the existence of a cause of action, and para. 92 thereof may be read as suggesting that *either* of two conditions must be met, i.e., the claim must "explain" why damages would be inappropriate, *or* a "link" between the plaintiff's funds and specific property must be shown. Strictly speaking, *Pro-Sys* was not about what must be *pleaded*; and in any event, the second condition has been pleaded in this instance.

In *Vidcom Communications Ltd. v Rattan*, 2022 BCSC 562 at para 34, Milman J. considered Newbury J.A.'s reasons in *Save-A-Lot* and *BNSF* and determined that in the context of a claim for a substantive constructive trust, a claim to trace stolen funds into the subject property can suffice in terms of pleading the requirement that damages are inadequate.

Most recently, in *Batth v Sharma*, 2024 BCCA 29, the British Columbia Court of Appeal considered the question of whether a pleading was a 'pleading of a substantive constructive trust' sufficient to constitute a pleading of an interest in land required to support a Certificate of Pending Litigation. Skolrood, J.A. (as he then was) writing for the court stated that a Notice of Civil Claim must be read as a whole and that where a plaintiff has pleaded a link between the fraudulent use of their money and the specific property said to be impressed with a constructive trust, it is not critical to have pled that a remedy in damages would be inadequate (citing *Save-A-Lot* at paras 14, 16 and *Vidcom* at para 34).

## IX. Two-stage Trials

The decision in *Michelin Tires, supra*, suggests that once the link between the contribution and the property has been sufficiently pled, the Court may order an enquiry to determine if the required nexus has in fact been made out. Evans J.A. held:

Thus, Lord Browne-Wilkinson did not suggest in *Westdeutsche Landesbank, supra*, that Goulding J. had erred in *Chase Manhattan, supra*, when he ordered an inquiry into whether the mistaken payment could be identified in the defendant's assets. Such an

inquiry would only have been ordered if Goulding J. had thought that tracing was still required to determine the availability of a constructive trust.

While such a result might be considered contrary to the general rule against litigating in slices, and inherently risky, the British Columbia Court of Appeal in *Tracy, supra*, affirmed that split trials can be a logical and efficient way of dealing with remedies where the facts and options may not be readily discernible from the outset.

The Court approved the trial judge's conclusion that, although the plaintiffs "could not receive double recovery, they were entitled to refrain from making an election until they were able to 'gauge which remedy [was] effective, particularly on the summary trial of common issues in a class proceeding.'"

[47] The procedural implications of this entitlement were discussed in the Canadian context in the supplemental reasons in *Waxman v. Waxman, supra*. Under the heading "The Proper Tracing Sequence", the Court rejected the argument that having failed to call evidence at trial relevant to the tracing of certain assets, the plaintiffs should not be allowed to "cure the deficiency by gathering information and tracing in stages." The Court noted that if parties were required to call such evidence at trial, the cost and length of litigation would be greatly increased. The defendants were ordered to submit to cross-examination and discovery regarding their assets in order to permit the plaintiffs "to recover misappropriated trust funds after legal or equitable rights have been conclusively proved at trial." (Para. 44.)

[48] Similarly in *Island Records*, the Court noted that where a plaintiff claims in the alternative damages or an accounting of profits, the practice in England is to have a "split trial", the first stage trying the issue of liability and the second, if liability is established, trying the question of assessment of damages and the calculation of profits. Lightman J. continued:

... As a concomitant with this practice, there has likewise developed the practice of limiting discovery at the first stage to documents relevant to the issue of liability and excluding documents relevant only to the second stage. In this way the burden of discovery at the first stage is reduced, and the invasion of confidence necessarily involved in discovery is postponed and (if liability is not established) entirely obviated...

[49] In my opinion, the same reasoning should apply in cases where damages and constructive trust are sought as alternative remedies... I need not decide whether, if the plaintiffs do not succeed in obtaining complete restitution by means of tracing, they may then revert to seeking damages.

This concept was applied by Masuhara J. in *Govorcin Fisheries, supra*. In the initial trial, the court determined that a partner to a fisheries joint venture had, *inter alia*, breached his fiduciary duty, his contractual duty of honest performance, and had converted over \$3,000,000 of the plaintiff's

share of revenues. In turn, the plaintiff alleged that these revenues had been used to purchase other fishing assets as well as real estate much of which was alleged to have been transferred to family members and others. The initial findings led the court to make the following orders:

[264] The plaintiff has established a fraudulent breach of fiduciary duty, unjust enrichment, and conversion and that the defendants have wrongfully diverted \$3,083,925.57. The plaintiff has also established that it is entitled to disgorgement of profits by the defendants. The plaintiff before electing damages or a proprietary remedy seeks a tracing order. This will inform the plaintiff as to the remedy it wishes to elect.

[265] In this regard, the plaintiff is granted an order reflecting the following terms:

(a) further discovery of both documents and account holders of bank records obtained in this litigation to determine what assets, if any, were purchased with the loans that have been paid with funds from these accounts;

(b) further examination/questioning of Denis Medanic as to his knowledge of the source of funds used to purchase any assets that he or the companies he managed acquired between 2000 and the end of 2017.

(c) A reference to the registrar to trace the source of funds used to purchase all of the assets listed at para. 86 of the NOCC and those listed in the plaintiff's written submissions under Disgorgement of Profits; namely:

i. A house and land for Denis Medanic at 860 Alderside Road, Port Moody, B.C. V3H 3A6, Parcel Identifier 011-148-641 Lot 16 Block A District Lot 226 Group 1 New Westminster District Plan 5683);

ii. A 9/10 interest in a house and land for Denis Medanic on 12 July 2006 at 140 Hemlock Drive, Anmore, B.C, Parcel Identifier 016-999-622 Lot 5 Section 20 Township 39 New Westminster District Plan NWP87804;

iii. A 20 per cent ownership interest for the Defendant, 0739960 B.C. Ltd. in Select Seafoods Canada Ltd. (incorporated 23 January 2012), which owns a large trawl vessel named the "Northern Alliance" with trawl licence T-82 and an amount of trawl quota unknown to the Plaintiff as well as to contribute to a shareholder's loan account;

iv. halibut licence L-179;

v. Sablefish licence K-40;

vi. Halibut licence L-33 and its related quota on the vessel the "Sea Kiss" along with halibut licence L-278 and its related quota on the vessel "Handliner" for Sea Kiss Fisheries;

vii. Eight or nine gillnet herring licences acquired in 2010;

viii. Purchase of the "Dovre B" quota in 2003;

- ix. Purchase and pay down the line of credit used to purchase [of] a pre-sale condominium in May of 2016 located in Coquitlam.

The matter was ultimately resolved prior to the Registrar's hearing or second phase of the trial.

In cases involving potential tracing, counsel should give consideration to the possibility of a split trial for a number of reasons. It may be premature at the outset for the plaintiff to gauge the appropriateness or desirability of tracing as an effective remedy. The evidentiary difficulties involved in tracing may not be a justifiable use of a party's or the court's resources before the court has determined whether the merits of the alleged proprietary claim have been established. Defendants may also resist disclosure of assets until such claim has been made out.

The critical step is to think through tracing as a possible remedy, and to ensure the necessary elements of any underlying proprietary claim have been adequately pled, along with the assertions necessary to establish a potential tracing. This may be done in the absence of information required to specify actual alleged destination accounts or properties, transfer dates, and other particulars which will ultimately need to be proven.

## **X. Conclusions**

The following principles emerge from the authorities cited herein:

1. Claims of tracing are normally premised on establishing an equitable proprietary claim to identifiable assets. Claims may also be made to trace assets which are subject to a statutory remedy.
2. Claims cannot be traced into the hands of a *bona fide* purchaser for value without notice.
3. Except in family claims, plaintiffs with a proprietary claim to assets may not trace their claims preferentially over other creditors beyond the extent of funds or property demonstrably following from the proceeds of their original proprietary claim. The claim of the beneficiaries is *prima facie* limited to the lowest intermediate balance traceable into the account or property.
4. In family claims (and subject to applicable legislation), the rule is more fungible such that, so long as there was no compensation paid for the work and services provided by one party to the family relationship then it can be inferred that their provision permitted the other party to acquire or improve lands.
5. In a competition between trust claimants, the applicable method of distributing funds will depend on the intentions of the parties, as discerned, for example, from a contractual requirement to segregate.

6. Where no such intention is discernible, the general rule is pro rata sharing based on tracing, which says that a claimant cannot claim an amount in excess of the lowest balance in a fund subsequent to his or her investment and before the next claimant's investment is made. This is often simply expressed as the lowest intermediate balance rule or LIBR.
7. Since the LIBR rule is predicated on the various contributions to the mixed fund or property being readily identifiable at multiple points throughout the account's history, the *pari passu ex post facto* (or pooled accounts) approach will apply where that information is unavailable. That approach involves taking the claim or contribution of the individual beneficiary to the mixed fund as a percentage of the total contributions of all those with claims against the fund at the time of distribution, and multiplying that factor against the total assets available for distribution in order to determine the claimant's pro rata share of those remaining funds.
8. Tracing must be adequately pled by asserting the requisite proprietary base and link to property which is identified either specifically or generically, failing which the claim may be dismissed.
9. Tracing claims may, in appropriate cases, be the subject of split trials, being an exception to the so-called rule against litigating in slices.